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Placing An Added Burden On The Plaintiff

Written medical opinion missteps can be fatal to a lawsuit

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As part of the Tort Reform Act of 1986, Connecticut's legislature required for all medical malpractice complaints a certificate signed by the plaintiff's lawyer that a reasonable inquiry into the merits of the claim was made and that there is a good faith basis for the lawsuit. In 2005, the legislature bolstered that effort by also requiring in General Statutes § 52-190a the filing of a written opinion of a "similar health care provider" that "there appears to be evidence of medical negligence." This written opinion requirement has generated a wave of litigation. Counsel should consider this developing area of the law carefully at the outset of a case, as the issues can be dispositive.

'Dismissal'

A critical change to the statute in 2005 was the addition of an express remedy, providing that the failure to obtain and file the written opinion "shall be grounds for the dismissal of the action." Before 2005, courts viewed defects in a good-faith certificate as grounds for striking the complaint, subject to the right to replead. But in 2008, the Appellate Court relied on the plain language of "dismissal" in the 2005 amendment to hold in *Rios v. CCMC Corp.* that a motion to dismiss can be used to challenge the absence of a written opinion. Then, in October 2009, the Appellate Court stated in *Bennett v. New Milford Hospital* that a motion to dismiss can be used to challenge a written opinion that "does not give a detailed basis for the opinion." Consequently, the absence of, or a defect in, a written opinion, discovered after a new lawsuit is time-barred, can permanently end a lawsuit.

What constitutes a sufficiently "detailed basis" for the opinion, however, remains an open issue for the courts. Also, the ability to cure a defect has not yet been fully explored. The Appellate Court, in *Votre v. County Obstetrics and Gynecology Group*, held this year that the absence of a written opinion is not a jurisdictional defect, leaving trial courts some discretion to allow a cure. But that discretion may be limited to saving lawsuits where the plaintiff had, in fact, obtained a written opinion before filing the lawsuit, yet, through inadvertence of counsel, failed to attach it to the complaint. In the court's view, such discretion "would not be at variance with the purpose of . . . prevent[ing] groundless lawsuits against health care providers."

Section 52-190a applies to all lawsuits, "whether in tort or in contract," against a health care provider for damages resulting from the provider's "negligence." In *Votre*, the plaintiff labeled her claims as negligent, reckless, and intentional infliction of emotional distress; breach of contract; and negligent, reckless, and intentional misrepresentation – all based on the defendants' obstetrical care of the plaintiff during her pregnancy. Although the plaintiff maintained that no written opinion was needed for her claims sounding in "ordinary negligence" or alleging misrepresentations, the court realistically read the complaint, holding that all of the claims required proof of the defendants' deviation from the obstetrical standard of care and, thus, the complaint was subject to the written opinion requirement. In so doing, the court articulated an important principle for practitioners on both sides of a case: "It is not the label that the plaintiff placed on each count of her complaint that is pivotal but the nature of the legal inquiry."

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Sufficiency And Author Of Opinion

In *Dias v. Grady*, the Supreme Court was asked this year whether the written opinion of "medical negligence" must address both a deviation from the standard of care and proximate cause. Defendants argued that the term "medical negligence" embodied all elements of a negligence claim – including causation. Plaintiffs rejoined that the term was intended to include only a breach of the applicable standard of care.

The Supreme Court found the undefined

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term "medical negligence" to be ambiguous, and considered the legislative history, policy, and the statute's relationship to existing legislation to discern legislative intent. The court concluded that the term "means breach of the standard of care and was not intended to encompass all of the elements of a cause of action for negligence." The court explained that the opinion must be written by a "similar health care provider," who may be familiar with the standard of care but may not be technically qualified to opine on causation. The court declined to accept the "bizarre result" of requiring a pre-complaint opinion from an expert potentially unqualified on the issue of causation.

The Appellate Court also addressed this year the requirement that the opinion be written by a "similar health care provider." In *Bennett v. New Milford Hospital*, the court held that, if the defendant physician is board certified or holds himself out as specialist, a similar health care provider must be another physician who is trained

and experienced in the same specialty *and* is board certified in the same specialty.

The court acknowledged that its holding excluded professionals who may otherwise be allowed to testify at trial as to the same opinion under the "catch-all" provision for expert testimony in General Statutes § 52-184c(d).

In its view, this result "may be harsh to would-be plaintiffs," but was true to the plain meaning of the text and "not absurd," even though it "may create a hurdle greater than that required to get to the jury once entry to the courthouse has been secured." Instead, it establishes "objective criteria, not subject to the exercise of discretion, making the pre-litigation requirements more definitive and uniform."

Counsel for both sides to litigation against health care providers would be wise to consider these issues carefully at the outset of litigation. A misstep by plaintiff's counsel can be fatal to the lawsuit, and alert defense counsel can exploit the plaintiff's failure to obtain a proper and timely written opinion. ■